Supreme Court, U.S.
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No. 96-8986

In The

Supreme Court of the United States

October Term, 1997

ARNOLD F. HOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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DATE	PROCEEDINGS
July 8, 1992	Judgment and Conviction
November 8, 1993	Judgment and Conviction affirmed on direct appeal
January 24, 1996	Motion for Collateral Relief under 28 U.S.C. § 2255 filed
May 1, 1996	Order by Magistrate Judge Requiring Government to Respond to § 2255 Motion
July 18, 1996	Order of the United States District Court for the District of Nebraska dismissing motion for collateral relief
July 29, 1996	Notice of appeal filed in district court
August 13, 1996	Case docketed by the United States Court of Appeals for the Eighth Circuit
August 13, 1996	Notice of Appeal treated as an Application to the United States Court of Appeals for the Eighth Circuit for Certificate of Appealability
September 13, 1996	Case submitted to a panel
November 4, 1996	Opinion of the United States Court of Appeals for the Eighth Circuit denying Certificate of Appealability

February 10, 1997	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

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GENERAL DOCKET FOR
Eighth Circuit Court of Appeals

Court of Appeals Docket #: 96-3118 Filed: 8/13/96
Arnold F. Hohn v. USA
prisoner petition – federal – motion to vacate PRO SE
Appeal from: U.S. DISTRICT COURT, NEBRASKA

Lower court information:
District: 0867-8 :8:CV96-100 lead: 8:CR90-93
Trial Judge: William G. Cambridge, Chief Judge
Date Filed: 1/24/96
Date order/judgment: 7/18/96
Date NOA filed: 7/29/96

Fee status: pending

Prior cases:
92-2653 FJM DPL DRH
Date filed: 7/24/92 Date disposed: 11/8/93 Disposition:

Current cases:
None
Counsel Information

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v.

UNITED STATES
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Respondent - Appellee

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ARNOLD F. HOHN

Petitioner - Appellant

v.

UNITED STATES
OF AMERICA

Respondent - Appellee

8/13/96	Prisoner Case Docketed Dist. Ct. Office: Omaha [744605] (llb)
8/13/96	APPLICATION for Certificate of Appealability [96-3118] [744620], (notice of appeal), docket entries, and judgment of 7/18/96 (llb)
8/13/96	MOTION of aplnt, Arnold F. Hohn, for leave to proceed on appeal in forma pauperis. [96-3118] [744622] (llb)
8/13/96	RECORDS received: Original File, consisting of 1 Volume(s), Location STL. [96-3118] (llb)
8/22/96	APPEARANCE for appellee, attorney Michael P. Norris [96-3118] [748379] (llb)
9/13/96	CASE SUBMITTED to a panel. [96-3118] (paw)
11/4/96	THE COURT: Theodore McMillian, Frank J. Magill, Morris S. Arnold. PER CURIAM

	OPINION FILED: PUBLISHED, DISSENT by Theodore McMillian [96-3118] [775934] (paw)
11/4/96	JUDGMENT: Theodore McMillian, Frank J. Magill, Morris S. Arnold denying application for Certificate of Appealability [744620-1] Application for Certificate of Appealability is denied in accordance with the opinion. [96-3118] [775938] (paw)
12/19/96	PETITION for REHEARING with suggestions for rehearing en banc. Filed by Appellant Arnold F. Hohn, w/service. TO COURT. [96-3118] (paw)
12/30/96	Clerk Letter sent notifying that party has an opportunity to respond to petition for Rehearing with suggestion for rehearing en banc filed by Arnold F. Hohn [793808-1] [96-3118] Response due by 1/9/97 (ema)
1/8/97	MOTION of aplee, USA, for extension of time to file a response to petition for rehearing until 1/21/97. [96-3118] [800150], TO COURT. w/service (paw)
1/10/97	JUDGE ORDER: granting appellee motion extension of time to file response to petition. [800150-1] [96-3118] [800265] Response to petition for rehearing due 1/21/97 (paw)
1/23/97	RESPONSE to petition for Rehearing with suggestion for rehearing en banc filed by Arnold F. Hohn [793808-1] [804073]. Response filed by USA. w/service TO COURT. [96-3118] (paw)
2/10/97	JUDGE ORDER: denying petition for Rehearing with suggestion for rehearing en banc [793808-1] filed by Arnold F. Hohn.

Judges McMillian, Beam, Loken and Hansen would grant. Petition for panel Rehearing is also denied. [96-3118] [810967] (paw)

2/19/97 MANDATE ISSUED [96-3118] (paw)

3/5/97 RECEIPT for Mandate. [96-3118] [820517] (paw)

3/11/97 Record Sent out of the office to lower court at the end of appellate proceedings, Records included: 1 OF; [96-3118] (paw)

5/19/97 U.S. Supreme Court notice regarding petition for writ of certiorari. Filed in the Supreme Court on 5/14/97. Supreme Ct. Case No.: 96-8986 [96-3118] [855896] (paw)

11/10/97 U.S. Supreme Court order granting Supreme Court notice for certiorari limited to the following question: In light of the fact that the Court of Appeals denied the petitioner's request for a certificate of appealability, does this court have jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the Solicitor General? [855896-1] . Order filed in the Supreme Court on 10/31/97 Sup. Ct. No. 96-8986 [96-3118] (paw)

Portion of Trial Transcript noting objection to the jury instruction on the 18 U.S.C. § 924(c) count (1/9/92)

INSTRUCTION CONFERENCE

* * *

[1332] Eighth Circuit instructions to the extent they have and I will withdraw my request for them.

THE COURT: All right. Thank you. Now, Mr. Cohen, do you have any objections to the Court's proposed instructions 1 through 30 –

MR. COHEN: Yes, Your Honor.

THE COURT: – inclusive, as they have now been amended?

MR. COHEN: Yes, Your Honor, I do. I think I have just two. The first concerns Instruction Number 7.

THE COURT: All right.

MR. COHEN: The present language half way down the page that paragraph starts out, "The phrase 'used a firearm' means having a firearm available to aid in the commission of," and it goes on and then later in that same paragraph says, "but does not require proof beyond a reasonable doubt that the firearm was available to provide protection." And I would ask that the Court change the phrase to instead read, "for the purpose of."

THE COURT: I'm sorry, I am –

MR. COHEN: I wasn't very eloquent. I believe the instruction as it is now allows this jury to find that merely having a firearm available is sufficient, and in this case where the defendant collected guns and used them

for other purposes, there is on doubt [sic] that firearms were available [1333] to aid in the commission of a drug offense, but whether those firearms were present for the purpose of aiding in the commission of that offense is a different question, and I think the intent of the statute was to prohibit people from using firearms to further their drug activities. I think this instruction as it is now allows the jury to convict Mr. Hohn even if there was no evidence that he was using these firearms to or that he had them available to him to further his drug activities. So I am suggesting that we should drop the where it says, "to aid in the commission of" and change that to read "for the purpose of aiding in the commission of."

THE COURT: That phrase comes out of the pattern Eighth Circuit, it doesn't come out of the pattern Eighth Circuit instruction itself, the form of it, which is 6.18.924, but it comes out of the language that is contained in the section of that pattern instruction entitled Notes on Use. I refer specifically to page 4 thereof, which is footnote 8, footnote 8 of the instruction, the pattern form instruction, which is in place in the form following the word carry. There it says, "No definition of carry is provided, but where carrying is charged," and it is charged here, "a definition may be appropriate. Carrying does not depend on proof that the defendant had actual possession of the weapon or used it in any affirmative manner," with reference to, cited there, three cases. One of them is the Fifth Circuit case decided [1334] the United States versus Rayborn (phonetic), United States versus Costa Czarez (phoenetic) and United States versus Brookington (phonetic) and then it goes on. It does not, the comment goes on or the note goes on to say that it

does not, it does require evidence that the firearm was available to provide protection to the defendant in connection with his drug trafficking, or to facilitate his success. The original version of this statute, some affirmative use of the weapon would require a nonviolent, nondrug trafficking crime, however, crimes in this category are no longer covered by this statute. The objection is overruled. I am going to add, however to the paragraph the words after the words, I am talking now about the paragraph that starts out the phrase, "used a firearm," means having a firearm available, et cetera, I am going to add on to the end of that paragraph the words "or to facilitate success."

All right, any other objections?

MR. COHEN: Yes, Your Honor. Instruction Number 8. The last sentence on the first page, "You are instructed that malicious destruction of property is a crime punishable by imprisonment for more than one year under the laws of the State of Nebraska." I would object to that. This was a 1974 conviction under the laws of the State of Nebraska. There has been no evidence as to what the maximum penalty for that crime was at that time. In fact, the only evidence the Government

* * *

Portion of Trial Transcript containing the jury instruction on the 18 U.S.C. § 924(c) count (1/9/92)

CLOSING ARGUMENTS

* * *

[1377] crime, a lesser included offense under Count I.

Instruction Number 7. The crime of using and carrying a firearm during and in relation to a drug trafficking crime, as charged against the defendant, Arnold F. Hohn, in Count II of the indictment has two essential elements, which are:

One, the defendant committed the crime of possession of Methamphetamine with intent to distribute; and

Two, during and in relation to the commission ot that crime the defendant knowingly used or carried a firearm.

The phrase "used a firearm" means having a firearm available to aid in the commission of possession of Methamphetamine with intent to distribute. Similarly, the phrase "carried a firearm" does not require proof of actual possession of a firearm or use of it in any affirmative manner, but does require proof beyond a reasonable doubt that the firearm was available to provide protection in connection with the possession of Methamphetamine with intent to distribute or to facilitate success.

For you to find the defendant Arnold F. Hohn, guilty of the crime charged under Count II of the indictment, the Government must prove both of these essential elements beyond a reasonable doubt; otherwise you must

find the defendant, Arnold F. Hohn, not guilty of the crime charged under Count II of the indictment.

* * *

UNITED STATES of America, Appellee,

v.

Arnold F. HOHN, Appellant.

No. 92-2653.

United States Court of Appeals,
Eighth Circuit.

Submitted Sept. 16, 1993.

Decided Nov. 8, 1993.

James M. Davis, Omaha, NE, argued, for appellant.

Michael P. Norris, Omaha, NE, argued, for appellee.

Before MAGILL, Circuit Judge, LAY, Senior Circuit Judge, and HANSEN, Circuit Judge.

MAGILL, Circuit Judge.

Arnold F. Hohn (Hohn) appeals from the final judgment entered in the district court[1] upon a jury verdict of guilt [sic] on all offenses. Hohn's appeal challenges three rulings of the district court. Hohn contends that the district court erred by denying his motion to dismiss on Speedy Trial Act grounds, by denying his motion to suppress evidence, and, finally, by denying his motion to dismiss Count I of the indictment which charged him with the distribution of drugs within 1000 feet of a public school. For the reasons discussed below, we affirm.

---

[1] The Honorable William G. Cambridge, United States District Judge for the District of Nebraska.

I. BACKGROUND

The Omaha, Nebraska, police received information from a confidential informant implicating Hohn as a methamphetamine dealer distributing from his home. The informant told the police, among other details, that Hohn was "paranoid," had a vicious dog, and always had at least one gun on his person. The police investigated the information received from the informant and, in the course of the police investigation, Hohn's curbside garbage receptacle was inventoried. The garbage inventory and subsequent testing revealed, among other drug-related items, a zip-lock bag and sno-seals[2] that both tested positive for methamphetamine. The police obtained a "no-knock" search warrant pursuant to Nebraska state law. Hohn was arrested when the search of his residence on June 20, 1990, resulted in the recovery of approximately sixteen grams of methamphetamine, drug paraphernalia, multiple weapons, and money.

Hohn's residence was located within 177 feet of the Central Park Elementary School (Central Park). Central Park's last day of classes for the 1989-90 school year was June 7, 1990. Because the Omaha public school system planned to remodel and attach an addition to the present building, the student body was temporarily reassigned to another building for the 1990-91 school year. From the last day of classes through the date of Hohn's trial, Central Park was carried on the school system's books as a public school. On June 20, 1990, the date of Hohn's arrest,

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[2] Sno-seals are folded paper used to hold powdered substances such as cocaine and methamphetamine.

the public maintained access to the school grounds for recreational purposes.

Hohn was consequently indicted on August 24, 1990, on three counts: (I) possession with intent to distribute methamphetamine within 1000 feet of real property comprising a public school in violation of 21 U.S.C. § 845a; (II) use of a firearm in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1); and (III) being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g) and 924(a)(2). Hohn made an initial appearance at his arraignment on August 30, 1990.

To gain additional time for pretrial motions, the government and Hohn entered into a stipulated agreement to extend the time for pretrial motions until October 19, 1990. The court then entered an order stating that the time between September 19 and October 19 was excludable for Speedy Trial Act purposes.

On October 1, 1990, a pretrial services officer filed a petition for action on conditions of pretrial release (the petition), thus notifying the court that Hohn's urine specimens had tested positive for amphetamine and methamphetamine. The court consequently held a hearing regarding that petition on October 11, 12, and November 9, 1990. The defendant and the government both presented evidence and argument at this hearing. The court found on November 9 that the government had presented clear and convincing evidence that Hohn had violated his conditions of release and ordered Hohn detained.

Hohn's counsel filed a motion to withdraw on December 10, 1990, and the court allowed Hohn's counsel to withdraw on December 18, 1990. On that same date,

Hohn's new counsel filed a motion to reconsider detention and urged the court to place Hohn in drug treatment as opposed to continuing to detain him. The court requested pretrial services to investigate Hohn's eligibility for drug treatment and, on December 20, pursuant to pretrial services' advice, released Hohn and ordered him to complete inpatient drug treatment or return to custody. The December 20, 1990, order specifically stated that if Hohn successfully completed drug treatment, a subsequent hearing would be held regarding further terms and conditions of release. Hohn entered inpatient treatment at St. Gabriel's Alcohol and Drug Treatment Center on December 20, 1990.

Hohn filed a motion to dismiss on Speedy Trial Act grounds on January 14, 1991. Meanwhile, on January 23, 1991, Hohn completed drug treatment and was released pursuant to a court order specifying his terms and conditions of release.

II. DISCUSSION

A. The Speedy Trial Act Claim

The Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1988), requires that a criminal defendant be tried within seventy days of the indictment or the date of first appearance before a judicial officer, whichever is later. *Id.* § 3161(c)(1). The statute allows, however, certain delays to be excluded for purposes of calculating the seventy-day time limit. *See id.* § 3161(h). If the government fails to comply with the terms of the Speedy Trial Act, a defendant may move for dismissal either with or without prejudice. *Id.* § 3162(a). The district court's legal findings are reviewed

de novo, but factual findings are reviewed under the clearly erroneous standard. *United States v. Hoslett*, 998 F.2d 648, 652 (9th Cir.1993).

Hohn argues that the court incorrectly excluded two periods of delay from its calculation for Speedy Trial Act purposes: (1) the period from October 20 through November 9 (twenty-one days), during which the court considered pretrial services' petition[3]; and (2) the period from December 21 through January 13, 1991 (twenty-four days), during which Hohn was treated as an inpatient at St. Gabriel's Alcohol and Drug Treatment Center.[4] The district court[5] excluded both these periods of time from its calculation of the seventy-day limit because it found that the first period was excludable pursuant to § 3161(h)(1)(F) as a pretrial motion and the second period of time was excludable pursuant to either § 3161(h)(1)(F)

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[3] Pretrial services' petition was filed on October 1. However, the period of time up to and including October 19 is not in dispute.

[4] The status of the other days is not in dispute. The parties agree that the period from August 31, 1990, through September 18, 1990, counts towards the 70-day limit (a total of 19 days). The parties likewise agree that September 19 through October 19 is excludable pursuant to the stipulated agreement. The parties agree that the period of time from November 10 through December 9 counts towards the 70-day limit (bringing the total to 49 undisputed days). The parties also agree that December 10 through December 20 is excludable due to the motions that were filed before the court.

[5] Magistrate Judge Richard G. Kopf made these findings. The district court, after a de novo review, adopted the magistrate judge's report in its entirety. The magistrate judge's findings subsequently adopted by the district court will be referred to as the district court findings.

or, in the alternative, § 3161(h)(4). We find that for purposes of determining whether the Speedy Trial Act seventy-day limit had lapsed, both periods of time were properly excluded from the district court's calculation of time.

1. October 20, 1990, through November 9, 1990

The period of time from October 20 through November 9 was properly excluded pursuant to § 3161(h)(1)(F) (subsection (F)) as a pretrial motion. The Speedy Trial Act allows for the exclusion of periods of delay due to proceedings concerning the defendant. The Act states in pertinent part:

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to –
>
> . . . .
>
> (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.

18 U.S.C. § 3161(h)(1)(F).

Hohn contends that the period of delay from October 20 through November 9 cannot be excluded pursuant to subsection (F) because subsection (F) refers to pretrial

motions and not petitions. Hohn further contends that because the petition was filed by pretrial services, and not a party, the court may not exclude this period of delay pursuant to subsection (F). Finally, Hohn contends that when the court granted continuances from the hearing's initial date of October 11 to October 12 and then to November 9, the court erred when it failed to make the specific statutory finding required pursuant to § 3161(h)(8)(A).

Section 3161(h)(1) specifically states that the periods of delay are "including but not limited to," thus creating in the statute the presumption that the scope of its enumerated delays are not to be interpreted narrowly. A motion is an application to the court for an order. Fed.R.Crim.P. 47. Once pretrial services had filed its petition, the government, now notified of Hohn's possible violation of his terms of release, was requesting the court to revoke Hohn's release – issue an order – when it presented its argument and evidence before the court on October 11, 12, and November 9.

We find that pretrial services' petition is the functional equivalent of a motion to revoke detention. Pretrial services discovered through urine testing that Hohn tested positive for methamphetamine. The use of methamphetamine was a violation of Hohn's original conditions of release and hence pretrial services was obligated to inform the court of its discovery. After the petition was filed, the government proceeded to prosecute the claim that Hohn had violated the court's original conditions of release. The court noted in its order revoking release that the government had established clear and convincing evidence that the defendant violated a term of release.

Hence, the court treated the petition precisely as it would have treated a motion for revocation of release brought either by the court's own motion or by the government. If the initial filing with the court had been brought by the government as a motion, Hohn's contention that the period from October 20 through November 9 cannot be excluded for Speedy Trial Act purposes would be untenable.

Petitions may be the functional equivalent of other recognized § 3161(h)(1) delays. *See United States v. Davenport*, 935 F.2d 1223, 1233 (11th Cir.1991); *accord United States v. Tyler*, 878 F.2d 753, 757 (3d Cir.), *cert. denied*, 493 U.S. 899, 110 S.Ct. 254, 107 L.Ed.2d 203 (1989). In *Davenport*, the defendant filed a petition for a writ of habeas corpus alleging that his pretrial detention violated the Speedy Trial Act. 935 F.2d at 1231. The *Davenport* court found that an extraordinary writ such as a petition for a writ of habeas corpus was functionally equivalent to an interlocutory appeal which is statutorily excludable under § 3161(h)(1)(E), because both an interlocutory appeal and a petition for a writ serve the same underlying purpose. *Id.* at 1233. Hence, in *Davenport*, time related to the petition for a writ's determination tolled the Speedy Trial Act clock. Similarly, we find that pretrial services' petition for action on conditions of pretrial release is the functional equivalent of a motion to reconsider pretrial release, because both serve the same underlying purpose.

Motions excludable under subsection (F) include any pretrial motion and are not limited to those motions enumerated in Federal Rule Criminal Procedure 12(b)(2). *United States v. Wilson*, 835 F.2d 1440, 1443 (D.C.Cir.1987).

Pretrial motions are excludable under subsection (F) because these motions require both court and party time. *Id.* Delay attributable to motions to revoke pretrial detention, from the date of filing until the matter is taken under advisement by the court,[6] is excluded pursuant to subsection (F). *United States v. Bowers*, 834 F.2d 607, 609 (6th Cir.1987). Thus, because pretrial services' petition is the functional equivalent of a motion to revoke pretrial detention, we find the time from the date the petition was filed until its final disposition at the end of the hearing is excluded for purposes of the Speedy Trial Act.

A nonparty to a criminal action may initiate a delay excludable pursuant to § 3161(h). Excludable delays may be caused by co-defendants. *See id.* § 3161(h)(7). Excludable delays may also be initiated by the court. *See, e.g., id.* § 3161(h)(1)(B), (C), (3)(A), (8)(A). The Pretrial Services Act of 1982[7] established pretrial services in each judicial district in order to assist judicial officers both in making pretrial release decisions and to supervise and monitor the conditions of release. S.Rep. No. 97-77, 97th Cong., 2d Sess. 1 (1981), *reprinted in* 1982 U.S.C.C.A.N. 2377. The actions of pretrial services officers are both a service to the court and an extension of the court. Any action taken by pretrial services is in effect an action by the court and

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[6] Subsection (F) excludes time from a motion's filing until either the motion is disposed of or taken under advisement. If the court requires time to consider the motion after all information is available, this time is limited to 30 days pursuant to § 3161(h)(1)(J). *Henderson v. United States*, 476 U.S. 321, 329, 331, 106 S.Ct. 1871, 1876, 1877, 90 L.Ed.2d 299 (1986).

[7] *See* 18 U.S.C. § 3152 (1988).

thus contemplated by Congress in enacting the Speedy Trial Act.

Hohn's argument that the district court erred when it failed to make a § 3161(h)(8)(A)[8] statutory finding is without merit. Section 3161(8)(A) allows a court to grant continuances should that court find it is in the interests of justice to do so after weighing the best interests of the defendant and the public to a speedy trial. The court under § 3161(8)(A) is required to make explicit findings; the court is not required to make explicit findings for § 3161(h)(1) delays. Section 3161(8)(A) provides an additional basis, in addition to the (h)(1) bases, for the court to grant a delay which will toll the Speedy Trial Act clock. For example, § 3161(8)(A) is frequently used by the court to grant continuances which will toll the Speedy Trial Act clock when, due to complexities in the case, counsel requires additional time to prepare. *See United States v. Driver*, 945 F.2d 1410, 1414 (8th Cir.1991), *cert. denied*, 502 U.S. 1109, 112 S.Ct. 1209, 117 L.Ed.2d 448 (1992); *United States v. Fogarty*, 692 F.2d 542, 546 (8th Cir.1982), *cert. denied*, 460 U.S. 1040, 103 S.Ct. 1434, 75 L.Ed.2d 792 (1983). The district court did not err when it allowed the

---

[8] 18 U.S.C. § 3161(h)(8)(A) states in pertinent part: Any period of delay resulting from a continuance granted by any judge . . . if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth . . . its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

hearing to be continued without making findings; here, the time was properly excluded pursuant to subsection (F), not § 3161(8)(A).

2. December 21, 1990, through January 13, 1991

We further find that the period of time from December 21, 1990, through January 13, 1991, was properly excluded for Speedy Trial Act purposes pursuant to subsection (F).[9] Hohn filed a motion to reconsider detention on December 18.[10] The district court requested the advice of pretrial services. After a hearing on December 20, 1990, and upon the advice of pretrial services, the court entered an order conditionally releasing Hohn on December 20 in order that Hohn could be evaluated at St. Gabriel's Alcohol and Drug Treatment Center. If Hohn was not accepted into drug treatment, he was to be returned to the custody of the United States Marshal. If Hohn failed to successfully complete drug treatment, he was to be returned to the custody of the Marshal. Only upon successful completion of the drug treatment program would the district court then consider granting a release order with specific terms and conditions.

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[9] The district court found this period of time was also excludable pursuant to § 3161(h)(4); that is, the district court found that Hohn while in drug treatment was physically unable to stand trial. Because we find this period of time was properly excluded pursuant to subsection (F), we need not reach the issue of Hohn's physical availability for trial while in drug treatment.

[10] Hohn concedes that subsection (F) excludes the period of time from December 18 through December 20 and is therefore only contending that the period from December 21 through January 13 was improperly excluded.

A motion to reconsider pretrial detention is a pretrial motion for which time is excludable pursuant to subsection (F). *United States v. Noone*, 913 F.2d 20, 27 (1st Cir.1990), *cert. denied*, 500 U.S. 906, 111 S.Ct. 1686, 114 L.Ed.2d 81 (1991). Thus, when Hohn filed his motion to reconsider detention on December 18, subsection (F) tolled the Speedy Trial Act clock until all information necessary to that motion's determination was before the court. Subsection (F) excludes the period of time after a motion is submitted but before it is under advisement. *Henderson*, 476 U.S. at 331, 106 S.Ct. at 1877. That is, subsection (F) excludes the period of time after a hearing in which the court record may remain open to receive further information. Here, the district court did not receive all the information necessary to determine the motion to reconsider detention until January 23, 1991, when Hohn completed drug treatment. The district court's order setting conditions of release was not issued until January 23, 1991. Consequently, during the entire time period at issue, from December 21 until January 13, 1991, the Speedy Trial Act clock was tolled pursuant to subsection (F).

We therefore find that both the period of time from October 20 through November 9 and the period of time from December 21 through January 13, 1991, were properly excluded pursuant to subsection (F). Hence, the motion to dismiss was properly denied because only forty-nine nonexcludable days had passed since Hohn's arraignment before a judicial officer.

B. Other Claims

Hohn makes two other claims: (1) that the district court erred when it denied his motion to suppress evidence, and (2) that the district court erred when it denied his motion to dismiss Count I.

Hohn asserts that evidence obtained from the search of his home should not have been admissible at his trial because the search warrant was defective. He claims that the search warrant was issued without probable cause, and he claims that the state-issued no-knock search warrant[11] violated 18 U.S.C. § 3109. Neither contention has merit. The district court properly concluded that the affidavit supporting the search warrant set forth probable cause, because the police officers sufficiently corroborated the information given by the informant. Furthermore, 18 U.S.C. § 3109[12] is inapplicable. *See United States v. Moore*, 956 F.2d 843 (8th Cir.1992). The issue is not whether the warrant complied with § 3109 but whether the state officials complied with Nebraska law and the Fourth Amendment. *See id.* at 848. We find that the district court properly denied the motion to suppress the

[11] In Nebraska no-knock warrants are expressly allowed. Neb.Rev.Stat. § 29-411 (1989).

[12] 18 U.S.C. § 3109 provides: The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

evidence obtained from this warrant because it was supported by probable cause and complied with Nebraska law and the Fourth Amendment.

Hohn also contends that Count I of the indictment should have been dismissed because he did not distribute drugs within 1000 feet of a school. The schoolyard statute[13] enhances the penalty for individuals convicted of distributing drugs within 1000 feet of a school. 21 U.S.C. § 860 (Supp. III 1988). Hohn's residence was located within 177 feet of Central Park. He argues that Central Park was not a public school at the time of the offense because it was not operational. That is, Hohn maintains that because Central Park was closed for remodeling at the time of the arrest that it was not a school as a matter of law.

The schoolyard statute, however, is unambiguous. For conviction, it simply requires that the defendant have an intent to distribute (or manufacture) a controlled substance and at the time be within 1000 feet of a school. *See* 21 U.S.C. § 860. Nothing in the statute requires that school be in session or that children be near or around the school at the time of the offense. *See United States v. Jones*, 779 F.2d 121, 123 (2d Cir.1985), *cert. denied*, 475 U.S. 1031, 106 S.Ct. 1236, 89 L.Ed.2d 344 (1986). In *Jones*, the defendant argued that the schoolyard statute did not apply to his distribution of drugs because the offense occurred at night without any potential for affecting children. *Id.* The *Jones* court rejected this argument finding, as we do, that

[13] Hohn was charged in Count I with a violation of 21 U.S.C. § 845a; however, this statute has been transferred to 21 U.S.C. § 860.

the language in the statute is unambiguous and does not require that a school be open at the time of the offense. *Id.*

The magistrate judge found in an opinion adopted by the district court that as a preliminary matter there was sufficient evidence to find that Central Park was a school. The final determination as to whether Central Park met the statutory definition of school was determined by the magistrate judge to be a question of fact appropriate for the jury. *See also United States v. Brookins*, 919 F.2d 281, 284 (5th Cir.1991) (holding that there was sufficient evidence before the jury for it to find by any common definition that the institution in question was a school). We agree. The Omaha public school system continued to carry Central Park on its books as a school. The children continued to use the school grounds. A school need not be in session to trigger the schoolyard statute's penalties. The district court did not err when it denied Hohn's motion to dismiss Count I.

III. CONCLUSION

Accordingly, we find that the district court properly denied Hohn's motion to dismiss on Speedy Trial Act grounds, his motion to suppress evidence, and his motion to dismiss Count I of the indictment. We affirm the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**8:CR90-93**
v.	)	**MEMORANDUM**
ARNOLD F. HOHN,	)	**AND ORDER**
Defendant.	)	**(Filed**
	)	**May 1, 1996)**

Defendant Hohn has filed a motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. (*See* filing 175). Liberally construing the allegations of the motion, *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), I conclude that the government should respond to defendant's claim.

BACKGROUND

Defendant was convicted on one count of possession with intent to distribute methamphetamine near a school, in violation of 21 U.S.C. §§ 841(a), 845(a); one count of carrying a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1); and one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g). Defendant was sentenced to serve a term of 90 months in prison. He appealed the sentence and the United States Court of Appeals for the Eighth Circuit affirmed.

Defendant now attacks his firearm conviction under 18 U.S.C. § 924(c)(1) on the ground that the government failed to present evidence sufficient to establish that he

"used" a firearm within the meaning [sic] that statutory section. As support for that claim defendant cites *Bailey v. United States*, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995).[1]

DISCUSSION

A section 2255 motion is not a substitute for direct appeal. *Anderson v. United States*, 25 F.3d 704, 706 (8th Cir. 1994); *Poor Thunder v. United States*, 810 F.2d 817, 823 (8th Cir. 1987). As such, a claim which could have been presented on direct appeal generally will not be considered in a section 2255 proceeding absent a showing of "cause" for the failure to raise the issue and "actual prejudice" resulting from that failure. *Ramey v. United States*, 8 F.3d 1313, 1314 (8th Cir. 1993); *Reid v. United States*, 976 F.2d

[1] In *Bailey*, the United States Supreme Court held that, to obtain a conviction for use of a firearm under 18 U.S.C. § 924(c)(1), the government must prove "an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense." *Bailey*, 116 S.Ct. at 505. In so ruling, the Supreme Court overruled prior authority holding that a defendant could be convicted under § 924(c)(1) based on evidence that the firearm was physically available to the defendant or that the defendant intended to use it if the need arose. *See e.g., United States v. Jones*, 990 F.2d 1047, 1050 (8th Cir. 1993) (" 'use' may be inferred from the availability and presence of the firearm, and actual possession is not necessary provided the firearm is under the defendant's control"), *cert. denied*, 114 S.Ct. 699 (1994), *denial of habeas corpus aff'd*, 39 F.3d 1184 (8th Cir. 1994).

The *Bailey* decision applies retroactively. *Bell v. United States*, 917 F.Supp. 681, 683-84 (E.D. Mo. 1996); *Sanabria v. United States*, 916 F.Supp. 106, 109-14 (D. P.R. 1996); *United States v. Turner*, 914 F.Supp. 48, 49-50 (W.D. N.Y. 1996); *Abreu v. United States*, 911 F.Supp. 203, 206-07 (E.D. Va. 1996).

446, 447-48 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1351 (1992). To show cause that would excuse such a procedural default, a defendant must show that some objective factor external to the defense prevented him from raising his defaulted claims. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986).

Defendant in this case did not raise his *Bailey* claim on direct appeal. However, the *Bailey* decision was not handed down by the Supreme Court until December 6, 1995, more than two years after defendants' convictions had been affirmed by the Eighth Circuit. Because *Bailey* was not decided at the time of the direct appeal, there is adequate cause for defendant's failure to raise it. *Bell v. United States*, 917 F.Supp. 681, 684 (E.D. Mo. 1996); *Abreu v. United States*, 911 F.Supp. 203, 207 (E.D. Va. 1996). Further, because the facts of defendant's case arguably fall within the purview of *Bailey*, his conviction under 18 U.S.C. § 924(c)(1) may be invalid, and he thus has established sufficient prejudice. *See id.*[2]

[2] The Eighth Circuit has recently held that *Bailey* is inapplicable where a defendant is convicted under section 924(c)(1) for "carrying" a firearm, as opposed to "using" a firearm. *See United States v. White*, ___ F.3d ___ (8th Cir. 1996) (available at 1996 WL 154228). The judgment in this case indicates that defendant was convicted of "carrying" a firearm in violation of section 924(c)(1). (*See* filing 158). However, the jury was instructed on both the "using" and "carrying" prongs of section 924(c)(1) and the verdict form does not clearly state which of those prongs the jury relied on in finding defendant guilty. (*See* filing 114, Instruction No. 7; filing 116). Thus, it is impossible to determine whether defendant was convicted under the "carrying" prong or the "using" prong of section 924(c)(1).

Consideration of the substance of defendant's claim under *Bailey* is beyond the scope of this initial review. I shall therefore require the government to respond to defendant's claim.

IT THEREFORE HEREBY IS ORDERED:

1. Plaintiff is given twenty days from the date of this order to respond to the defendant's motion in accordance with the terms of this memorandum, pursuant to the rules following 28 U.S.C. § 2255.

2. This file hereby is transferred to Omaha for all further proceedings. The clerk shall direct this matter to the attention of the assigned trial judge.

Dated May 1, 1996.

BY THE COURT

/s/ David L. Piester
United States
Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	8:CR 90-00093
Plaintiff,	)	ANSWER TO FILING #175
vs.	)	
ARNOLD F. HOHN,	)	(Filed Jun. 28, 1996)
Defendant.	)	

Pursuant to Rule 5, Rules Governing Proceedings in the United States District Courts Under Section 2255 of Title 28, United States Code, and this Court's Order of May 1, 1996, the United States answers Filing #175, Defendant's Motion to Vacate, Set Aside or Correct Sentence, as follows:

1. The United States denies that Arnold F. Hohn is entitled to any post-conviction relief. No evidentiary hearing has been accorded regarding the post-conviction motion. An evidentiary hearing will not be needed as this matter can be resolved on the basis of the record and files before the Court. The United States respectfully submits that this is an issue of law that must be developed from the transcript of the record at trial and post-conviction pleadings and briefs.

2. Hohn claims that his Section 924(c) conviction should be vacated because of the United States Supreme Court's recent decision in *Bailey v. United States*, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995). The United States denies that the Supreme Court's decision in *Bailey* would grant relief to Hohn. The United States would submit that sufficient

evidence was presented to support the jury's verdict and Hohn's conviction for carrying a firearm.

3. The United States acknowledges that the jury instruction provided does not comport with the status of law since the Supreme Court's decision in *Bailey*.

Under Federal Rule of Criminal Procedure 30, in order to claim error in a jury instruction, an objection is required which specifies the grounds of the objection. In the present case, the charge to the jury with regard to the 924(c) violation is found in instruction #7. Although Hohn objected to instruction #7, his objection did not go to whether one must affirmatively brandish a firearm but, rather, objected to the wording of the particular instruction. Specifically, Hohn asked the Court to drop the words "to aid in the commission of" and substitute the words "for the purpose of aiding in the commission of." (Tr. at 1332-34). Therefore, only if there is plain error, may this the Court vacate the conviction.

In *United States v. Caldwell*, 954 F.2d 496 (8th Cir. 1992), the Eighth Circuit Court of Appeals said

> "the Supreme Court has explained that the plain-error doctrine 'authorizes the Court of Appeals to correct only 'particularly egregious errors' . . . that 'seriously affect the fairness, integrity or public reputation of judicial proceedings.' " *United States v. Young*, 470 U.S. 1, 15 (1985) (quoting *United States v. Frady*, 456 U.S. 152, 163 (1982) and *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

The plain-error rule is to be " 'used sparingly,' " and only when there has been a fundamental error so basic and prejudicial that justice could not have been done, or

when the error deprives the accused of a fundamental right. *Young*, 470 U.S. at 15 (quoting *Frady*, 456 U.S. at 63); *United States v. Garcia*, 897 F.2d 1413, 1422 (7th Cir. 1990). *Id.* 500-501.

The government agrees that it would be plain-error had the instructions only given the jury the option of convicting the defendant under the "use" prong of 18 U.S.C. § 924(c), and the evidence only supported that option. However, in this case, as in *Bailey*, the jury was instructed that the defendant could be convicted if he used *or* carried a firearm.

4. The question remains as to the appropriate standard of review. The Third Circuit, in a case involving a *Bailey* question, has observed:

> "we must now determine whether the district court's error in instructing the jury was harmless or requires reversal of Mr. Price's conviction on the Section 924(c)(1) count. The error was one of statutory interpretation, not constitutional in nature. "We upheld that non-constitutional error is harmless when 'it is highly probable that the error did not contribute to the judgment.' " . . . citations omitted. Because we conclude that the error was harmless, we will affirm.

United States v. Price, 1996 W.L. 67398 (3rd Cir. (Pa.)), at p. 4.

If the Court determines that the error was constitutional in nature, the standard of review would be whether the error was harmless, beyond a reasonable doubt. *See United States v. Davis*, 417 U.S. 333, 346 (1974); *Chapman v. California*, 386 U.S. 11 (1967).

5. Evidence was presented to the jury that Hohn carried a firearm. That evidence is recited in the prosecution version and can be found at the transcript of trial. It is true that Hohn did not have a firearm on his person when the Omaha Police Division's Emergency Response Unit entered and secured the residence for the purpose of executing a search warrant. However, a reasonable inference can be drawn from the evidence that Hohn was carrying a firearm prior to the officers' entry based upon the items that were located, i.e., drugs, guns and ammunition, and where they were located.

The search resulted in the recovery of approximately 16 grams of methamphetamine. One of those grams was recovered from Hohn's person. (Tr. at 408, 646; Exhibit 1). Approximately 12 grams of methamphetamine were contained in a brown case on the kitchen counter. The methamphetamine was further contained in four plastic baggies, three of which held 3.5 grams of methamphetamine. This methamphetamine was surrounded by a .380 caliber semi-automatic pistol, a Colt revolver and a Ruger .357 pistol, all within arms reach of the methamphetamine. Each of these weapons was loaded. (Tr. at 159-160, 163-169, 647; Exs. 8, 9, and 10). Two additional firearms, a Ruger .22 caliber semi-automatic pistol and an Excam .22 caliber revolver were also found in the kitchen. (Tr. at 417-420, 648; Exs. 18, 19 and 20).

The .380 caliber semi-automatic pistol and the Colt revolver found on the kitchen counter within arms reach of the methamphetamine, packaged for redistribution, were found in holsters. The obvious inference to be drawn from this evidence is that Hohn, at some time prior to the execution of the search warrant, entered his

residence and placed his belongings, which included the methamphetamine and firearms, onto the counter. Therefore, at some point prior to the execution of the search warrant, he obviously carried the firearms during his drug trafficking activities.

6. The evidence obviously establishes "carrying," under 18 U.S.C. § 924(c). The Supreme Court said in *Bailey*, "a firearm can be carried without being used, e.g., when an offender keeps a gun hidd3en in his clothing throughout a drug transaction." Furthermore, in *United States v. Freisinger*, 937 F.2d 383, 387 (1991), this court held that transporting weapons in the passenger compartment of a car constitutes carrying them within the meaning of the statute.

7. The United States respectfully submits that the instruction to the jury was error, but harmless. The United States respectfully submits that the Motion to Vacate, Set Aside or Correct Sentence should be denied. The United States would inform the Court that a similar issue is presently before the Eighth Circuit Court of Appeals. On April 8, 1996, the Court heard argument in *United States v. Behler*, Case No. 92-3956NEL. As of this date, a decision has not been rendered.

Respectfully submitted,

THOMAS J. MONAGHAN
United States Attorney

/s/ Michael P Norris
By: MICHAEL P. NORRIS
(#17765)
Assistant United States
Attorney
P.O. Box 1228-DTS
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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing was served on the following by placing same in the U.S. Mails, postage prepaid, this 28th day of June, 1996.

Arnold F. Hohn, #13249-047
P.O. Box 1000
Leavenworth, Kansas 66048

/s/ Michael P Norris
Assistant U.S.
Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, v. ARNOLD F. HOHN, Defendant.	)	8:CR90-93 **MEMORANDUM OPINION** (Filed Jul. 18, 1996)

This matter is before the Court on the defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (filing 175). Because the Court finds that the defendant is not entitled to the relief he seeks, the Court will dismiss the defendant's motion.

In his motion, the defendant attacks his conviction for using a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). The defendant argues that, in light of the United States Supreme Court's opinion in *Bailey v. United States*, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), the government did not present enough evidence at his trial to sustain a conviction under § 924(c)(1). However, as Magistrate Judge Piester noted upon initial review of the defendant's motion, the defendant did not raise his *Bailey* claim on direct appeal. *See* filing 176, p. 3. Thus, the Court finds that the defendant has waived that claim, *See United States v. McKinney*, 79 F.3d 105, 109 (8th Cir. 1996) (concluding that Mr. McKinney had waived his argument based on *Bailey* because "Mr. McKinney's motion for acquittal did not challenge the correctness of [the Eighth Circuit's] previous cases, he did not object to

the instruction that embodied the principles announced in those cases, and he did not argue in his initial appeal brief that his conviction for using firearms was in any way infirm"), and that the defendant's motion, which is based on that claim, should be dismissed with prejudice. Accordingly, the Court will enter separate judgment dismissing the defendant's motion with prejudice.

Dated this 18th day of July, 1996.

BY THE COURT:

/s/ William G Cambridge
WILLIAM G. CAMBRIDGE,
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	8:CR90-93
	)	
v.	)	JUDGMENT
	)	
ARNOLD F. HOHN,	)	(Filed
	)	
Defendant.	)	Jul. 18, 1996)

In accordance with the memorandum opinion entered herein on this date, it is ordered that the defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (filing 175) is dismissed with prejudice.

DATED this 18th day of July, 1996.

BY THE COURT:

/s/ William G Cambridge
WILLIAM G. CAMBRIDGE,
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF NEBRASKA

ARNOLD F. HOHN DEFENDANT,	)	
VS.	)	CASE NO.
UNITED STATES OF AMERICA PLAINTIFF,	)	8:CR90-93

NOTICE OF APPEAL

(Filed Jul. 29, 1996)

NOTICE IS HEREBY GIVEN THAT ARNOLD F. HOHN, DEFENDANT IN THE ABOVE CAPTIONED CAUSE, HEREBY APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE 8TH CIRCUIT FROM THE ORDER DENYING MOTION 28 U.S.C. SECTION 2255, ENTERED IN THIS ACTION ON THE 18TH DAY OF JULY, 1996; RECEIVED BY DEFENDANT ON THIS THE 21ST DAY OF JULY, 1996; BY WAY OF UNITED STATES MAIL. DEFENDANT WILL SHOW THIS RULING IS NOT CONSISTENT WITH CLEARLY ESTABLISHED LAW, AND IS THEREBY IN ERROR AND IS SUBJECT TO REVIEW BY THE APPELLANT COURT. ARNOLD F. HOHN HEREBY APPEALS THE DISTRICT COURT'S JUDGEMENT.

Dated this 24 day of July, 1996.

/s/ Arnold Hohn
ARNOLD F. HOHN
REG. NO. 13249-047
B-2 DORM L.V.C.
P.O. BOX 1000
LEAVENWORTH, KANSAS
66048-1000

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3118

Arnold F. Hohn, *
Appellant, * Appeal from the United
* States District Court for
v. * the District of Nebraska.
*
United States of America, * (PUBLISHED)
*
Appellee. *

Submitted: September 13, 1996

Filed: November 4, 1996

Before McMILLIAN, MAGILL, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

The petitioner in this case, unsuccessful in his effort to have his sentence set aside under 28 U.S.C. § 2255, seeks review in this court. Petitioner's appeal, however, will not lie unless we issue him a certificate of appealability, and such a certificate is not available unless the petitioner makes a "substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2).

The petitioner complained to the district court that at his trial the jury instructions dealing with what it means

to use a firearm under 18 U.S.C. § 924(c)(1) did not conform to the principles outlined in *Bailey v. United States*, 116 S.Ct. 501 (1995). It seems to us that under these circumstances a certificate cannot issue, because the petitioner is not making a constitutional claim: He is making a claim to a federal statutory right. *Bailey* did no more than interpret a statute, and an incorrect application of a statute by a district court, or any other court, does not violate the Constitution. The Constitution does not guarantee that judges will always be right. It does guarantee, it is true, that persons accused of crimes will receive due process; but the petitioner makes no due process claim with respect to the trial judge's actions, and trial errors hardly ever rise to the level of a due process violation in any case.

United States v. Liquori, 438 F.2d 663 (2d Cir. 1971), on which Judge McMillian relies in his dissenting opinion, is not to the contrary. The predicate for that case was that the Supreme Court had on constitutional grounds invalidated certain statutory presumptions, *see id.* at 666-67, and the petitioners were claiming that the statute under which they were convicted was invalid because it contained an unconstitutional presumption. *See id.* at 665. There is no such claim here. The petitioner does not maintain that § 924(c)(1) is unconstitutional or that it was unconstitutionally applied to him. He maintains only that the statute was wrongly applied to him.

For the foregoing reasons, we deny the certificate.

McMILLIAN, Circuit Judge, dissenting.

Arnold F. Hohn appeals from the district court's dismissal with prejudice of his 28 U.S.C. § 2255 motion

claiming the benefit of *Bailey v. United States*, 116 S.Ct. 501 (1995). Section 102 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, amended 28 U.S.C. § 2253(c) to require a "substantial showing of the denial of a constitutional right" before a certificate of appealability may issue. The court denies Hohn a certificate. I must respectfully dissent.

Background

After a confidential informer told police Hohn was a high-level methamphetamine dealer, they investigated and obtained a no-knock warrant. When the police arrested Hohn in his living room, they found one gram of methamphetamine in his wallet. They also went to the kitchen where they found 15.8 grams of methamphetamine, three loaded pistols approximately one foot from the drug, and another firearm. In Hohn's bedroom the police found 3.1 grams of methamphetamine in a cigarette package and another loaded pistol approximately two feet from the package. Finally, in another bedroom they found drug paraphernalia and a gun case with shotguns and rifles. Cindy Vandry arrived at the house during execution of the warrant. She had twice purchased methamphetamine from Hohn at his home, and on those occasions she had observed "a substantial amount of currency in the bedroom."

The government charged Hohn with possession of methamphetamine with intent to distribute it, using and carrying fifteen firearms in relation to the methamphetamine offense, and being a felon in possession of firearms. He stood trial, admitted possession of some of

the methamphetamine, admitted he owned the firearms as an avid gunsmith and hunter, disputed the police version of the location of some of the firearms, and testified he believed he could legally possess the firearms because his attorney had told him that his 1974 juvenile conviction for malicious destruction of property did not count as an adult felony.

At trial, counsel urged substitution of "for the purpose of" in place of "available to aid in the commission of" in the verdict director for the firearms "use" charge. The jury convicted Hohn on all counts. He did not raise the instructional issue in his pre-*Bailey* appeal. This court affirmed. *United States v. Hohn*, 8 F.3d 1301 (8th Cir. 1993).

In his § 2255 motion, Hohn argued: (1) his conduct was not a violation of 18 U.S.C. § 924(c)(1) as interpreted by *Bailey;* a fundamental miscarriage of justice would result unless the court addressed the issue; (3) he should not be penalized for not raising the issue on direct appeal because he relied on years of Eighth Circuit precedent; (4) denial of a remedy would show "a lack of due process in the judicial system," quoting *United States v. Loschiavo*, 531 F.2d 659, 666 (2d Cir. 1976) (affirming vacation of conviction on change-in-law ground not raised on direct appeal); and (5) he was prejudiced by the jury instruction that said no affirmative firearms use was required but that availability of a firearm was adequate for a guilty verdict.

The government responded that *Bailey* did not aid Hohn because evidence supported a carrying conviction. It admitted the verdict directing instruction was erroneous under *Bailey*, and Hohn was not carrying a firearm

when officers executed the warrant. It argued, however, that the kitchen firearms, "within arm's reach of the methamphetamine," were in holsters and supported the inference that at some time Hohn "entered his residence and placed his belongings, which included the methamphetamine and firearms onto the counter." The government concluded it was obvious Hohn had carried the firearms during his drug trafficking activities, and the instructional error was harmless.

In reply, Hohn argued that the instruction was error under *Bailey*, citing *United States v. Webster*, 84 F.3d 1056, 1060, 1065-66 (8th Cir. 1996) (permitting brief on *Bailey* after initial submission of direct appeal and reversing because plain error in pre-*Bailey* jury instruction permitted conviction for "mere presence and ready availability" of firearm where defendant admitted purchase of a firearm for his protection). He also urged that the government's methamphetamine-within-arm's-reach-of-firearms argument was insufficient under *United States v. White*, 81 F.3d 80, 83 (8th Cir. 1996) (affirming "carrying" conviction on direct appeal and saying government must prove that the defendant bore the firearm on or about his person during and in relation to a drug trafficking offenses), quoting *Bailey*'s language, "the inert presence of a firearm, without more, is not enough to trigger § 924(c)(1)." 116 S.Ct. at 508 (discussing different meanings of "use" – active employment, storage, placement for active use). He included a copy of Cynthia Vandry's testimony that she saw the rifles in the gun case but no handguns when she was at Hohn's house.

The district court noted Hohn had not raised the *Bailey* claim on direct appeal, found he had waived it, and

dismissed the § 2255 motion with prejudice, quoting *United States v. McKinney*, 79 F.3d 105 (8th Cir. 1996) (2-1 decision) (holding *Bailey* issue waived on direct appeal because McKinney did not challenge previous cases, object to the instruction, or argue issue in opening brief).

Discussion

I dissent because I believe the Due Process Clause of the Fifth Amendment does not permit federal convictions for conduct that does not violate a federal statute.[1]

Congress must define federal criminal offenses. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812). Judicial construction of a statute "is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) (*Rivers*) (footnote omitted). Under these two principles, courts have granted post-conviction relief after changes in the law. *See, e.g., Davis v. United States*, 417 U.S. 333, 346-47 (1974) (§ 2255 proper when law changes so that conviction and punishment are for act the law no longer makes criminal) (change in interpretation of selective service regulation); *United States v. Dashney*, 52 F.3d 298, 299 (10th Cir. 1995) (applying new interpretation of

[1] For that reason, I also disagree with the court's holding that *Bailey* challenges cannot be raised in a § 2255 motion after a plea of guilty. *Bousley v. Brooks*, No. 95-2687, 1996 WL 560214, at *3-4 & nn. 2-4 (8th Cir. Oct. 3, 1996). The better position is, in my opinion, *United States v. Barnhardt*, 93 F.3d 706, 708-09 (10th Cir. 1996) (applying *Bailey* retroactively in second § 2255 motion after defendant pleaded guilty) (collecting *Bailey* cases).

"financial structuring" offense in § 2255 action after defendant had served sentence to prevent complete miscarriage of justice); *Dalton v. United States*, 862 F.2d 1307, 1310 (8th Cir. 1988) (finding new interpretation of mail fraud statute applicable but affirming because no prejudice shown under standard that trial error worked to § 2255 movant's "*actual* and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions," *citing United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original)); *Ingber v. Enzor*, 841 F.2d 450, 454-55 (2d Cir. 1988) (applying new interpretation of mail fraud statute in § 2255 action and excusing failure to raise the claim under earlier interpretation).

The Second Circuit invoked constitutional principles when it confronted four § 2255 challenges to drug convictions in the wake of the Supreme Court's invalidation of statutory presumptions. The court relied on

> the simple and universal rule that a judgment in a criminal case in which the prosecution has offered and the record discloses no proof whatever of various elements of the crime charged has a fatal constitutional taint for lack of due process of law. . . . We must examine the principles involved in the constitutional ruling under consideration and decide whether, upon "considerations of convenience, of utility, and of the deepest sentiments of justice," the judgments of conviction were so "tainted by some fundamental unfairness within the orbit of constitutional law" that we cannot allow them to stand.

United States v. Liquori, 438 F.2d 663, 669 (2d Cir. 1971) (internal citation omitted).

In post-*Bailey* § 2255 cases, the issue is not advance notice that conduct is criminal (the familiar void-for-vagueness claim), but delayed notice that conduct is not criminal (change-of-law claim under *Rivers* rationale). Because *Bailey* represents such a clear break with precedent regarding the definition of "use" under § 924(c)(1), Hohn had cause for failing to appeal the denial of his objection to the verdict director. *United States v. Wiley*, 922 F. Supp. 1405, 1411 (D. Minn. 1996) (Magnuson, C.J.); *see also Dyer v. United States*, 23 F.3d 1421, 1423-24 (8th Cir.) (rejecting change of law in another circuit as cause), *cert. denied*, 115 S.Ct. 136 (1994); *Dalton v. United States*, 862 F.2d at 1310 (finding cause after new interpretation of mail fraud statute).

Conclusion

I conclude that depriving persons of the benefit of the delayed notice that conduct is innocent violates Due Process by tolerating convictions for conduct that was never criminal. Under that proposition, a post-*Bailey* § 2255 motion presents a constitutional question as required by amended § 2253(c)(2). I also conclude Hohn's case presents a "substantial showing of the denial of a constitutional right." Accordingly, I would grant a certificate of appealability.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3118NEO

Arnold F. Hohn, Appellant,	*	
vs.	*	**Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc**
United States of America, Appellee.	*	

The suggestion for rehearing en banc is denied. Judge McMillian, Judge Beam, Judge Loken, and Judge Hansen would grant the suggestion. The petition for rehearing by the panel is also denied.

February 10, 1997

Order entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

(ORDER LIST: 522 U.S.)

FRIDAY, OCTOBER 31, 1997

CERTIORARI GRANTED

97-174 CASS CTY., MN, ET AL.
V. LEECH LAKE BAND OF INDIANS

97-372 UNITED STATES V. U.S. SHOE CORP.

The petitions for writs of certiorari are granted.

96-8986 HOHN, ARNOLD F. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted limited to the the [sic] following question: In light of the fact that the Court of Appeals denied the petitioner's request for a Certificate of Appealability, does this Court have jurisdiction to grant certiorari, vacate, and remand this case per the suggestion of the Acting Solicitor General? Jeffrey S. Sutton, Esquire, of Columbus, Ohio, a member of the Bar of this Court, is invited to brief and argue this case, as *amicus curiae*, against this Court's jurisdiction.